

August 14, 1998

VIA HAND DELIVERY

Mary L. Cottrell
Secretary
Department of Telecommunications and Energy
100 Cambridge Street, 12th Floor
Boston, MA 02202

Re: A-R Cable Services, Inc., A-R Cable Partners, Cablevision of Framingham, Inc., Charter Communications, Greater Worcester Cablevision, Inc., MediaOne of Massachusetts, Inc., MediaOne of Pioneer Valley, Inc., MediaOne of Southern New England, Inc., MediaOne of Western New England, Inc., MediaOne Enterprises, Inc., MediaOne of New England, Inc., Pegasus Communications and Time Warner Cable v. Massachusetts Electric Company - D.T.E. 98-52

Dear Secretary Cottrell:

Enclosed for filing are an original plus six (6) copies of Massachusetts Electric Company's Answer to Complainants' Motion for a Protective Order. A certificate of service is also enclosed. Please time- and date-stamp the additional copy of this filing letter and return in the enclosed self-addressed stamped envelope.

Respectfully,

cc: Jeanne L. Voveris (3 copies)
Sean Hanley (1 copy)
Mauricio Diaz (1 copy)
Jeffrey Hall (1 copy)
Service List (1 copy each)

August 14, 1998

VIA FAX AND HAND DELIVERY

Jeannie L. Voveris
Hearing Officer
Department of Telecommunications and Energy
100 Cambridge Street, 12th Floor
Boston, MA 02202

Re: A-R Cable Services, Inc., A-R Cable Partners, Cablevision of Framingham, Inc., Charter Communications, Greater Worcester Cablevision, Inc., MediaOne of Massachusetts, Inc., MediaOne of Pioneer Valley, Inc., MediaOne of Southern New England, Inc., MediaOne of Western New England, Inc., MediaOne Enterprises, Inc., MediaOne of New England, Inc., Pegasus Communications and Time Warner Cable v. Massachusetts Electric Company - D.T.E. 98-52

Dear Ms. Voveris:

By this letter I acknowledge receipt of the Complainants' list of exhibits to be made part of the record in the captioned proceeding. While Mass. Electric does not seek to eliminate any exhibit proposed by Complainants, I do offer the following comments:

Exhibit CABLE-19 As Mr. Robinson mentioned at the proceeding on August 12, 1998, Mass. Electric requests that the Department treat the provided document not as evidence of the truth of the matters discussed therein, but rather as evidence of the position taken by the cable television operators in another proceeding relative to issues now raised in DTE98-52.

Exhibit CABLE-25 This exhibit contains the Supplemental Response of Complainants to MECO-23. Originally, Complainants had refused to answer MECO-23 on the grounds that the information sought was irrelevant to the proceeding. Pursuant to your ruling which compelled the Complainants to answer, Mass. Electric received the information contained in this exhibit six days after discovery had been closed. Mass. Electric finds the information provided by Complainants both incomplete and non-responsive to the question asked in MECO-23. Given the critical importance of sag and tension data to the proper determination of the worker safety space on poles, Mass. Electric respectfully requests the Department's permission to serve follow-up discovery on Complainants relative to this exhibit.

Respectfully,

Enclosures (cited exhibits)

cc: Jeanne L. Voveris, Hearing Officer (3 copies)
Sean Hanley, Rates Division (1 copy)
Mauricio Diaz, Rates Division (1 copy)
Jeffrey Hall, Rates Division (1 copy)
Service List

Certificate of Service

I hereby certify that I have this day served the foregoing document upon the following person(s):

George B. Dean, Esq.
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Jeffrey N. Stevens, Esq.
Boston Edison Company
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Boston, Massachusetts 02199

Dated at Westborough, Massachusetts August 14, 1998.

Paige Graening
Associate Counsel
Massachusetts Electric Company
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**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

A-R CABLE SERVICES, INC.
A-R CABLE PARTNERS
CABLEVISION OF FRAMINGHAM, INC.
CHARTER COMMUNICATIONS
GREATER WORCESTER CABLEVISION,
INC.
MEDIAONE OF MASSACHUSETTS, INC.
MEDIAONE OF PIONEER VALLEY, INC.
MEDIAONE OF SOUTHERN NEW
ENGLAND, INC.
MEDIAONE OF WESTERN NEW
ENGLAND, INC.
MEDIAONE ENTERPRISES, INC.
MEDIAONE OF NEW ENGLAND, INC.
PEGASUS COMMUNICATIONS
TIME WARNER CABLE

Complainants,

v.

MASSACHUSETTS ELECTRIC
COMPANY

Respondent.

D.T.E. No. 98-52

**MASSACHUSETTS ELECTRIC COMPANY'S ANSWER
TO COMPLAINANTS' MOTION FOR A PROTECTIVE ORDER**

Pursuant to the Massachusetts Department of Telecommunications and Energy's

(Department) rules and regulations found at 220 C.M.R. § 106 (c) (2), Rule 26 (c) of the Massachusetts Rules of Civil Procedure, M.R.C.P. R.26(c), and the ground rules issued by the Hearing Officer in this proceeding, Massachusetts Electric Company (Mass Electric) hereby objects to Complainants' Motion for a Protective Order seeking to shield from public review certain data requested by both the Department and Mass. Electric.¹ The Complainants have requested a protective order from the Department on the grounds that the information sought by the Department and Mass. Electric in DTE-CABLE-1-4 and MECO-6, respectively, is exempt from public disclosure and is proprietary, confidential and commercially sensitive. *Complainants' Motion* at 2. The Complainants also suggest that any disclosure required by the Department be subject to non-disclosure agreements. *Id.* Mass. Electric moves the Department to (1) reject Complainants' Motion and (2) order full disclosure of the data. Such order would permit the Department to fulfill its statutory duty to "consider the interest of subscribers of cable television services as well as the interest of consumers of utility services". G.L. c. 166 §25A.

I. The Department Is Required by Statute to Balance the Interests of Mass. Electric and Complainants' Customers.

As quoted above, the statute authorizing the Department to regulate the rates, terms and

¹The Department's Information Request DTE-CABLE-1-4 seeks disclosure of 1997 intrastate operating revenues for each of the Complainants. Mass. Electric's Information Request MECO-6 seeks total gross revenues from all services provided by Complainants in the Commonwealth. Related to the foregoing Information Requests is MECO-8, subpart 7, which Complainants have not fully answered as of the date of this Answer. See Attachment 1 to this Answer for the text of the aforementioned Information Requests and the responses provided by Complainants on the record.

conditions applicable to attachments also affirmatively *requires* the Department to consider the interest of cable television subscribers as well as the interest of electric utility customers. *Id.* This is the Department's singular statutory duty within the context of the instant proceeding. To perform its duty and the requisite analysis to support its decisionmaking, the Department must have complete and proper data before it.

Fairness dictates that Mass. Electric be permitted to conduct its own analysis of the requested data. As the Respondent in this proceeding, Mass. Electric must have the opportunity to challenge Complainants' assertions with facts, not unsupported speculation. Mass. Electric has already, without objection, provided similar information to Complainants and the Department.² The data sought by both the Department and Mass. Electric is now necessary for the proper balancing of interests at the heart of this proceeding.

II. The Department Needs the Requested Data In Order to Support Its Decision In This Proceeding.

The interests of the Department, the Complainants and Mass. Electric do not end with mere disclosure, however. The Department must articulate a clear rationale for its decision in this proceeding -- a rationale sufficiently supported by factual and financial data analysis to withstand judicial review. Complainants' efforts to shield the data sought would prevent the Department

²In the course of this proceeding, Mass. Electric has disclosed its revenues from sales of electricity (Response to Information Request Cable-4), its revenues from pole attachment rates (Response to Information Request Cable-3) and very detailed financial records via its FERC Form 1 (Hearing Exhibit MECo-5). See Attachment 2.

from clearly and fully stating the basis for its interest-balancing decision. In order to withstand any judicial review of the decision it makes in this proceeding, the Department must place the data that it and Mass. Electric seeks in the public record.

The Department has broad authority to determine what information may be pertinent to its ratemaking function. 220 C.M.R. § 1.06. The Supreme Judicial Court shows great deference to the Department's expert decisionmaking, but not when such decisionmaking is deemed to be arbitrary and capricious or based on incomplete reasoning. "We uphold the Department's decision unless it is shown that it is based on an error of law, unsupported by substantial evidence, arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law...Our review of the department's decision, however, is impossible unless the decision is 'accompanied by a statement of reasons...including determination of each issue of fact or law necessary to the decision.'", Stow Muni. Elec. Dept. v. Dept. Pub. Utils., *Slip op.* at 5 , (Dec. 30, 1997), citing Mass. Inst. of Tech. v. Dept. of Pub. Utils., 425 Mass. 856, 867-868 (1997), citing G.L. c. 30, § 14 (7). For these reasons, it is in the Department's best interest to require full public disclosure of the information requested and to provide a reasoned analysis of that information as a backdrop to its decision in this proceeding.

III. The Rules of Discovery Give the Department the Right to Order Disclosure of the Data Sought.

The Department's procedural rule that governs discovery is 220 C.M.R. § 1.06 (6) (c).

This rule states that in relevant part:

1. Purpose. The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to *gain access to all relevant information* in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of issues, protect the rights of parties, and *ensure that a complete and accurate record is compiled*.
2. Rules Governing Discovery. Because the Department's investigations involve matters with a wide range of issues, levels of complexity and statutory deadlines, the presiding officer shall establish discovery procedures in each case which take into account the legitimate rights of the parties in the context of the case at issue. In establishing discovery procedures, the presiding officer must exercise his or her discretion to *balance the interests of the parties* and ensure that the *information necessary to complete the record* is produced without unproductive delays. In exercising this discretion, the presiding officer shall be guided by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26 *et seq.* These rules, however, shall be instructive, rather than controlling. (emphasis added)

The text of the rule speaks for itself: Department policy favors full disclosure of relevant data for ratemaking decisions. With anything less, the Department runs the risk of an unsupported decision.

IV. Complainants Have Failed to Meet the Requirements of Department Precedent as to Burden of Proof.

Department precedent requires the party seeking protection for commercially sensitive materials to bear the burden of proving the need for such protection. *See Bay State Gas Co.,*

D.P.U. 97-24, at 2 (Sept. 23, 1997); “A proponent of a request must substantiate why such a request meets the requirements of G.L. c. 25, s. 5D. A mere recitation that a particular document is ‘competitively sensitive’ or otherwise confidential is insufficient to meet that burden of proof.” *Colonial Gas Company*, D.P.U. 96-18, at 4 (1996), citing D.P.U. 96-39.

Complainants’ contention that the requested data is exempt from public disclosure under G.L. c. 166A §§ is too weak to sustain its Motion for protection. Complainants hearken back to past practice as evidence that the Department should not require full public review.

Complainants’ Motion at 2. Complainants ignore the express requirements placed upon the Department by G.L.c. 166 § 25A to “consider the interest of subscribers of cable television services as well as the interest of consumers of utility services” This statutory requirement governs the outcome of this proceeding, not the provision cited by Complainants.

Complainants’ assertion that the requested information is “not publicly disclosed in the ordinary course of business”, *Complainants’ Motion* at 2, ignores the Department’s obligation under the statute and both the Department’s and Mass. Electric’s right under the rules of procedure to obtain data relevant to the issue at the heart of this proceeding. See also IV below.

Complainant’s protestation that the cable market is becoming more competitive is also too frail to sustain Complainants’ position. They have failed to support their desire to prevent public dissemination of their revenue statements. Complainants’ mere reference to the potential harm they may suffer is insufficient to carry their burden of proof.

Complainants’ assertion that protection of their revenues from public disclosure will not impede this proceeding or prejudice any party is totally without merit. Negotiations over a non-

disclosure agreement proposed by Complainants would quite likely overtake the briefing schedule set by the Hearing Officer. This proceeding cannot be fully developed and a reasoned decision from the Department cannot issue without a full and timely public discussion of the impact of the rates on both Mass. Electric and Complainants.

V. It Is Likely That Complainants Have Disclosed the Requested Data In Other Fora.

At least some of the Complainants are publicly-held companies and thus are required to make public disclosures of financial data with other agencies such as the Securities Exchange Commission.³ Complainants' Response to Information Request MECo-19 identifies additional regulatory agencies with jurisdiction over Complainants. Complainants' Supplemental Response to Information Request MECo-20, while non-responsive to the question posed, indicates that the Federal Communications Commission and local franchising authorities have some jurisdictional reach over Complainants. Such jurisdiction may also require the filing of certain data, including financial information, with those authorities. Indeed, in their Response to Information Request MECo-21, Complainants state that they submit to the ratemaking authority of both the Department's Cable Television Division and the Federal Communications Commission. (See Attachment 4.) Therefore, it seems possible, if not likely, that Complainants have disclosed the requested data to these two ratemaking bodies.

³In their partial Response to Information Request MECo-18, some Complainants provided publicly available annual reports for their parent companies. Complainants have not provided the additional information promised in their partial Response. Mass. Electric (and, presumably, the Department) continues to wait for the production of the promised documents. See Attachment 3.

Even if, as Complainants assert, the Department has historically treated such information as not subject to public scrutiny because of protections derived from G.L. c. 166A §8, Complainants have brought their Complaint in this proceeding under a different section of the law which *requires a balancing of interests*. G.L. c. 166 §25A. Furthermore, that section of the law on which Complainants rely, G.L. c. 166A, §8, requires them to file “a [sworn] financial balance sheet and statement of ownership which shall be open to public inspection”. It is thus easy to conclude that Complainants have disclosed at least elements of the information sought by the Department and Mass. Electric for other purposes and on other occasions. Complainants’ attempt to deprive the Department and Mass. Electric from public review of the data they seek is undoubtedly at odds with Complainants’ behavior in other fora and under other sections of the law.

VI. Recommendation and Conclusion

In adopting Mass Electric’s recommendation, the Department will be able to review and report information critical to the proper balancing of interests required by G.L. c. 166 §25A. Mass. Electric seeks to exercise its due process right to review, analyze and discuss the same information on behalf of Mass. Electric customers who will be directly affected by the outcome of this proceeding.

Respectfully submitted,

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